DEC 4 2000

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Supreme Court, U.S.
FILED
DEC 4 - 2000
CLERK

No. 00-393

IN THE

Supreme Court of the United States

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[redacted] THE TOWN OF LINCOLN, MASSACHUSETTS AND THE LINCOLN PLANNING BOARD FOR [redacted] BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICI CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Town of Lincoln, Massachusetts, Planning Board ("Planning Board") hereby moves, pursuant to Rule 37.2 of the Supreme Court of the United States, for leave to file a brief as *amicus curiae* in support of the petition for writ of certiorari, No. 00-93, to the United States Court of Appeals for the Second Circuit. The Planning Board is filing this motion for leave to join in the *amicus curiae* brief filed by the Town of Lincoln, Massachusetts ("Lincoln" or "Town") and does not seek to file a separate, additional brief. Since Lincoln is a town and its brief is submitted by its authorized law officer, the Board of Selectmen, under Rule 37.4 of the Court leave of the Town to file an *amicus curiae* brief is not required. A copy of the Town's brief is attached.

As explained in the Town's brief, the Planning Board is the entity responsible under state law, the Massachusetts Zoning Act, Mass. Gen. Laws ch. 40A, and local by-laws for developing land use policy in Lincoln. Since 1997, Lincoln and particularly its Planning Board have actively worked to develop and implement policy in the Town regarding the Telecommunications Act of 1996, Section 407, 47 U.S.C. § 332(c)(7). While the Lincoln Town Meeting is the legislative body which ultimately adopts or rejects specific local land use regulations ("by-laws"), the Planning Board is the entity which develops planning policies and recommends specific by-laws. Mass. Gen. Laws, ch. 40A, § 5.

The petition for writ of certiorari requests review of a provision of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(iv), which bars a state or local governmental instrumentality from making a decision regarding a wireless communications facility based upon "the environmental

effects of radio frequency emissions" so long as the facility complies with Federal Communications Commission "regulations concerning such emissions." As stated in the Town's brief, hearings before the Planning Board focused on facts and issues related to this statutory provision. Town's Brief, pp. 3-5. The information described in the Town's brief was first brought to the attention of town officials through the Planning Board hearing process. The Planning Board, therefore, is uniquely positioned to bring these matters before the Court. Permitting the Planning Board to join the *amicus curiae* brief of the Town does not burden judicial resources because the Planning Board is not asking to file an independent brief but merely to join the brief of the Town. The Planning Board did not request the consent of all the parties prior to the filing of this motion because it interpreted Rule 37.4 as including the Planning Board within the provision allowing a "city, county, town, or similar entity" to file an *amicus curiae* brief without consent of the parties or leave of court.

The Planning Board respectfully requests that it be granted leave to file the attached brief.

Respectfully submitted,

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INTEREST OF THE AMICI CURIAE[1]

The Town of Lincoln, Massachusetts ("Lincoln"), is a municipal subdivision of the Commonwealth of Massachusetts. Lincoln is a suburban, semi-rural community located approximately sixteen miles from Boston. The Lincoln Planning Board ("Planning Board") is the entity responsible under state law, the Massachusetts Zoning Act, Mass. Gen. Laws ch. 40A, and local by-laws for developing land use policy in Lincoln.

Since 1997, Lincoln and its Planning Board, in response to the Federal Telecommunications Act of 1996, Section 704, 47 U.S.C. § 332(c)(7), have been developing and implementing a local zoning by-law to effectuate the intent of the statute regarding the placement of personal wireless services facilities in the Town consistently with state law and traditional land use planning considerations.[2] Lincoln and its Planning Board are very concerned about the interpretation of 47 U.S.C. § 332(c)(7)(B)(iv) by the Federal Communications Commission ("FCC"), which was upheld by the Circuit Court of Appeals for the Second Circuit in *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000), which is the subject of the pending petition for writ of certiorari. This interpretation precludes the town from considering any evidence regarding health effects of radio

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1. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the amici or its counsel, have made a monetary contribution to the preparation or submission of the brief.

2. For convenience, Lincoln uses the term cellular towers or wireless communications facilities ("WCF") to refer to "personal wireless services facilities" under the statute.

frequency emissions on the residents of the town. Such preclusion, in turn, seriously interferes with the ability of town officials to protect the residents of Lincoln from potentially harmful radiation where the federal government has abdicated its regulatory role in this regard. *See* Petition for Writ of Certiorari, pp. 7, *et seq*.

The issue presented by the petition for writ of certiorari is of great concern to Lincoln because the fundamental question of the relationship between the federal government and local regulatory authorities is at stake. The Lincoln Town Meeting, which is the legislative branch of town government, voted on March 28, 1998:

> That it is the sense of this Meeting that, setting aside legal and financial considerations, the Town opposes the preemption, by the Telecommunications Act of 1996 or any other comparable federal or state legislation or regulation of the sovereign rights of the people of Lincoln, or of the duty of Lincoln Town officials to protect Town residents, their health, safety, environment, freedom of speech, and all other basic rights.

To effectuate this intent, the Board of Selectmen voted to authorize the filing of this brief as amici curiae.

LINCOLN'S RESPONSE TO THE TELECOMMUNICATIONS ACT OF 1996 AND ITS EFFORTS TO REGULATE WIRELESS COMMUNICATIONS FACILITIES

In early 1997, the Planning Board held its first public hearing to consider a proposed zoning by-law to allow the construction of Wireless Communications Facilities ("WCF") in the town by creating an overlay district.[3] In preparation for this public hearing, the board appointed a task force of resident scientists, communications engineers and a lawyer to make recommendations. This task force met with representatives from the wireless service providers and industry experts. The members also reviewed so-called propagation studies generated by the wireless service providers. Propagation studies are shown on computer created maps illustrating projected wireless communications coverage from a variety of locations and tower heights based upon local topography and other constraints. As a result of the task force's work, a number of potential sites for an overlay zoning district were identified and prioritized.

In April 1997, the Lincoln Town Meeting adopted a local zoning by-law regulating the placement of WCFs in the town. Six sites, totaling approximately 175 acres, scattered throughout the town were designated as the WCF overlay district. Two of the sites were located at the eastern and western town boundaries along State Route 2, a major arterial

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3. An overlay district is a land use planning mechanism whereby particular uses are permitted as an "overlay" of the uses permitted in the underlying district. In an overlay district, a permitted use is one which is allowed in addition to the use permitted in the underlying district.

highway bisecting the town. The by-law provided that a WCF could be located within the overlay district upon the issuance of a special permit by the Planning Board.[4]

Throughout the process of developing a WCF by-law, public hearing and Town Meeting discussions frequently focused on the potential biological hazards of low-level microwave radiation. Each time the public, including scientists experienced in the field of radio frequency technology, expressed concern over potential health hazards, representatives of the wireless communications industry stated that under federal law, Lincoln and the Planning Board could not consider environmental or health issues relating to wireless communications technologies. Lincoln sought to reconcile these concerns with the express language of Section 704, 47 U.S.C. § 332(c)(7)(B)(iv), which prohibits a state or local governmental instrumentality from regulating "the placement, construction or modification" of a WCF "on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." In a dual effort to satisfy this statutory restriction while protecting its citizens, Lincoln's by-law allows the Planning Board to consider "potential human health hazards due to radio signal radiation from the proposed facility, to the extent not contrary to federal law."

Lincoln also learned through the public hearing process that the United States Congress failed to fund research on the health effects of low-level, non-heat generating,

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4. The substance of the Lincoln by-law is set forth in *Omnipoint Communications MB Operations, LLC v. Town of Lincoln*, 107 F. Supp. 2d 108, 111-12 n.4 (D. Mass. 2000).

microwave emissions, even though scientific studies, albeit mostly in other countries, suggested potential hazards, especially to children. Indeed, the public hearing process revealed that many other industrial countries have established the maximum acceptable threshold levels of human exposure to microwave emissions at a much lower level than those established by the United States. Moreover, Lincoln learned that the current acceptable emission standards established by the FCC fail to consider non-thermal biological effects of microwave energy. Original standards for public safety, adopted by the FCC, were based on the heating effects on biological tissue of low levels of microwave energy. The standards completely neglected to consider non-thermal effects of microwave emissions on humans. Several recent peer-reviewed scientific studies have raised significant concerns about such hazards, especially to children. While the FCC has failed to conduct studies of either thermal or non-thermal biological effects from microwave energy, it has dismissed the hazards of such effects and Congress has not funded any of the proposed independent research by the Environmental Protection Agency (EPA). *See* Petition for Writ of Certiorari, pp. 7-11.

During its hearing process, Lincoln also heard evidence that each microwave antenna has a limited capacity regarding the number of calls it can handle at one time. Therefore, as demand increases, more antennas will be required and the environment will become more saturated with microwave emissions, especially in areas with high traffic volumes, such as Lincoln. Yet, there are no FCC regulations on microwave energy which address the cumulative effect of multiple emitters.

Despite Lincoln's careful planning process, a provider of personal wireless services has succeeded in overriding the town's by-law to locate a tower outside of the overlay district. *Omnipoint Communications MB Operations, Inc. v. Town of Lincoln*, 107 F. Supp. 2d 108 (D. Mass. 2000). As a result, the town will now have an 89-foot high red and white striped tower with a blinking red light less than five feet from the neighboring property in a developed residential neighborhood. While this WCF will be constructed regardless of the outcome of this petition, the town's elected officials, the Board of Selectmen and the Planning Board, urge that certiorari be granted so that in the future local authorities will have the right to consider and protect public health and safety when the federal government has failed in its responsibility to set realistic health standards for cellular microwave emissions.

REASONS FOR GRANTING THE WRIT

Since the passage of Section 704, local zoning authorities across the country have struggled with the task of balancing the mandate of the federal law to encourage the build-out of a national telecommunications network with traditional local land use concerns. *See*, for example, *Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County*, 205 F.3d 688 (4th Cir. 2000); *Town of Amherst, NH v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9 (1st Cir. 1999); *Aegerter v. City of Delafield*, 174 F.3d 886 (7th Cir. 1999); *Omnipoint Communications, Inc. v. City of Scranton*, 36 F. Supp. 2d 222 (M.D. Pa. 1999); *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732 (C.D. Ill. 1997). Nonetheless, despite local efforts to control the spread of tall towers dominating the landscape, the towers are becoming ubiquitous features and local authorities are losing

the battle to the telecommunications industry. *Omnipoint Communications MB Operations, LLC v. Town of Lincoln*, 107 F. Supp. 2d at 121. Until the filing of the petition which is now before the Court, the Lincoln authorities believed that their hands were tied in terms of attempting to regulate the placement of a WCF based on health or environmental effects. The pending petition presents the Court with the opportunity to redress this imbalance by adding fundamental constitutional principles of federalism to the equation.

The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people." As recently explained in *Alden v. Maine*, 527 U.S. 706, 749 (1999), this constitutional mandate avoids "state governmental processes" from being "denigrate[d]" by "plenary federal control." While the particular context in *Alden* differed from that presented here, the principle is the same: Congress may not dictate that states follow a particular procedure which imposes on state sovereignty, that is, preempts state action, without risking violation of the Tenth Amendment. Principles of federalism which allow Congress to preempt state action are effectuated only when the federal government then acts to regulate in the area which it has preempted. *Alden*, 527 U.S. at 749; *Petersburg Cellular Partnership*, 205 F.3d at 705-06 (Niemeyer, J., concurring). When the federal government, however, first preempts and then fails to regulate, the Tenth Amendment requires that the states and the people retain that authority. *See* Petition for Writ of Certiorari, pp. 22-23. As applicable here, the right of the states and the people therefore may not be preempted, under the supremacy clause, from regulating the environmental effects of radio frequency emissions while the FCC fails to do so, without running afoul of the Tenth Amendment.

The Second Circuit paid lip service to this principle when it disposed of the issue in *Cellular Phone Task Force*, 205 F.3d at 95, stating: "Congress may preempt state and local governments from regulating the operation and construction of a national telecommunications infrastucture." However, the Second Circuit failed to correctly apply the principle. As noted by Judge Niemeyer in his concurring opinion in *Petersburg*, in approving the position of the local zoning authority, Section 704 requires local zoning authorities to "employ the standards Congress mandated in deciding the siting of wireless communication facilities. This uninvited intrusion into traditional state and local authority . . . leaves the state or locality with 'no choice at all.' " 205 F.3d at 697, 702-703. Accordingly, without risking violation of the Tenth Amendment, the federal government may not simultaneously preempt local regulation and then fail to assume the responsibility for protecting the public health and safety which it has appropriated to itself. *Id.* at 705-06.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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